

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

RECEIVED

MAR 06 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 00-9
Table of Allotments,) RM-9526
FM Broadcast Stations.)
(Beaumont and Dayton, Texas))
)
)
To: Chief, Allocations Branch)

COMMENTS OF KXTJ LICENSE, INC.

KXTJ License, Inc., ("KXTJ"), licensee of Station KXTJ(FM), Channel 300C, Beaumont, Texas, by its attorneys, hereby submits its Comments on the Commission's *Notice of Proposed Rule Making*, DA-0079, released January 14, 2000 ("NPRM") in the above-captioned proceeding. In the NPRM, the Commission proposed the reallocation of Channel 300C from Beaumont to Dayton, Texas, as the community's first local aural service, and the modification of Station KXTJ(FM)'s license accordingly. KXTJ hereby reaffirms its intention to apply for the channel if it is reallocated to Dayton.¹

The Proposed Reallocation Serves the Commission's Allotment Priorities

The Commission should adopt the proposed reallocation because it would not deprive Beaumont of its sole local transmission service and would result in a preferential arrangement of allotments. If Channel 300C is reallocated to Dayton, Beaumont will continue to be served by 10

¹ KXTJ filed its request pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990).

No. of Copies rec'd 074
List ABCDE

radio stations.²

To determine whether a proposed reallocation would result in a preferential arrangement of allotments, the Commission compares the “existing arrangement of allotments with the proposed arrangement of allotments using [the Commission’s] FM allotment priorities.” Georgetown and Garden City, South Carolina, 12 FCC Rcd 13394, 13395 (1997). While the Commission’s first two allotment priorities (provision of first or second aural service) are not relevant to this case, the third allotment priority, provision of a first local transmission service, is decisional.³ Reallocation of Channel 300C to Dayton will provide Dayton with its first local transmission service, without depriving Beaumont of its only local transmission service. Under well-established precedent, the provision of a first local service to Dayton provides greater public interest benefits than the retention of an 11th such service at Beaumont.

Dayton is a Community Deserving of a Local Radio Service

Dayton has the necessary indicia of an independent community deserving of a local radio station.⁴ Dayton is a thriving community with its own local government, including an elected mayor, City Manager, and City Council. The Council oversees departments providing the community with water and sewer systems, garbage collection and sanitation systems, street construction and upkeep. Dayton has its own post office and zip code (77535), and a local telephone directory, which is shared with the neighboring city of Liberty, Texas. The local newspaper, The Liberty Vindicator, is published in Dayton three times a week. Dayton has local bus service, provided by Kerrville Bus Lines. The city has its own police department and its own volunteer fire department. The Dayton

² The NPRM, in footnote 1, makes reference to the stations licensed to Beaumont but does not identify them. In addition to KXTJ(FM), the following radio stations are licensed to Beaumont: KAYD(AM), KAYD-FM, KLVI(AM), KQXY-FM, KRCM(AM), KTCX(FM), KTXB(FM), KVLU(FM), KYKR(FM), and KZZB(AM).

³ See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982).

⁴ See Arcadia and Fort Meade, Florida, 13 FCC Rcd 2989 (1998).

Independent School District operates two elementary schools, one junior high and one high school. Dayton also has its own public library. Dayton is home to numerous medical facilities, banks, and other commercial businesses, as well as recreational facilities, churches, civic organizations, and seasonal activities. See Exhibit 2 to KXTJ Petition for Rulemaking, filed January 4, 1999.

Dayton is not a part of an Urbanized Area. It is an independent city, home to its own government, businesses, schools and services and, consequently, to issues of concern to local residents. As such, Dayton is precisely the type of community intended to be favored under the Commission's allotment priorities, as reallocation will provide service to a community deserving of, but currently without, local radio service. Accordingly, Commission policy and the public interest weigh in favor of providing a first local service to Dayton, as compared to maintaining 11 local services in Beaumont.

The Proposed Reallocation may be Made Consistent with Commission Rules and Policies

At its current site, Station KXTJ(FM) is short-spaced, pursuant to Section 73.215 of the Commission's Rules, to two stations: 2.3 miles to Station KTBQ(FM), Nacogdoches, Texas; and 2.8 miles to Station KRXZ(FM), Erath, Louisiana. However, KXTJ has proposed an alternate reference point for Channel 300C at Dayton, Texas, which would eliminate the short-spacing to KTBQ(FM) and reduce the short-spacing to KRXZ(FM) to 2.6 miles.⁵

The Commission has approved the reallocation of a channel short-spaced under Section 73.215 of the Rules where the proponent of the reallocation provided an alternate site, for purposes of the rule making proceeding, which met the Commission's spacing requirements. See Princeton and Elk River, Minnesota, released October 8, 1999. In Princeton and Elk River, there were

⁵ It is noted that there is no site to which KXTJ could move KXTJ(FM) that would eliminate the short-spacing to KRXZ(FM) without creating short-spacings to other allotments.

theoretical gain and loss areas at the proposed reference point, but the Commission noted that those areas were already well-served (*i.e.*, received five or more reception services), so that the change of reference point would not adversely affect the public. *Id.* KXTJ's proposal in this case is similar. The alternate reference point for Channel 300C at Dayton, Texas, would eliminate the short-spacing to Station KTBQ(FM). The theoretical gain and loss areas represented by the reference point change are already well-served. The only substantive difference in this proceeding is that under KXTJ's proposal not all short-spacings will be eliminated by the reference point change. There will continue to be a short-spacing to Station KRXZ(FM), although it will be **reduced** by 0.2 miles. However, the short-spacing to Station KRXZ(FM) was created **by** the KRXZ(FM) licensee **to** Station KXTJ(FM). As a result, the KRXZ(FM) short-spacing should not prevent KXTJ from providing the public interest benefits of a first local service at Dayton.

The Commission has recognized that stations should not be precluded from advancing the public interest through Section 1.420(i) reallocations simply because they have been adversely affected by Commission rule changes. For example, stations that are now short-spaced but were fully spaced prior to the introduction of the Commission's spacing rules in 1964 (so-called "grandfathered" stations) have been reallocated to new communities where the licensees have proposed no site change (and the result is a short-spaced allotment). See Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307(1992).

In the NPRM in the instant proceeding, the Commission recognized the similarity between KXTJ's proposal and that of the petitioner in the then-pending Killeen and Cedar Park, Texas proceeding, in that in both cases the stations could operate at their proposed community as fully-spaced stations **but for** stations that have been authorized by the Commission to operate under Section 73.215 in the direction of Beaumont and Killeen, respectively. The Commission has

requested comment on this analysis, and on whether the Newnan and Peachtree City policy should be extended to the facts of KXTJ's case.

Since the release of the NPRM in this proceeding, the Commission has released its Report and Order in Killeen and Cedar Park, Texas (MM Docket No. 98-176, released February 2, 2000). In that case the Commission properly extended the Newnan and Peachtree City policy to a station with Section 215 short-spacings created to it, and properly permitted the proposed reallocation to Cedar Park. Likewise, the Commission should apply the same rationale to permit the reallocation to Dayton proposed herein.

In Newnan and Peachtree City, the rationale for permitting the reallocation by a grandfathered station was that a station in compliance with the Commission's Rules when authorized should be afforded the same opportunity to change its community of license, in conformity with the Rules, where as a result of the reallocation no new short-spacings are created, no existing short-spacings are exacerbated, and there is no increase in the potential for interference. Newnan and Peachtree City, Georgia, supra, at 6308.⁶ Furthermore, the Commission extended the policy to so-called pre-1989 grandfathered short-spaced stations (*i.e.*, stations that became short-spaced as a result of the Commission's 1989 changes to the spacing rules) in Fremont and Holton, Michigan, released October 10, 1999.

The Newnan and Fremont line of cases stand for the proposition that a short-spaced station should be able to change its community of license as freely as non short-spaced stations (even when the change results in a short-spaced allocation) when the station did not create the short-spacing that affects its ability to change community of license. But for the introduction of the FM Table of

⁶ The Commission reaffirmed this policy in Berlin and North Conway, New Hampshire, and Oceanside and Encinitas, California, both released September 10, 1999.

Allotments in 1964 and the Commission's changes to the spacing rules in 1989, stations affected by those actions would not be short-spaced. The reasoning of these cases is equally applicable to situations, such as KXTJ's, where a station became short-spaced through the actions of another station (approved by the Commission) taking advantage of Commission contour protection rules, and not through action initiated by the station seeking a change in community of license.

In Killeen and Cedar Park, Texas, the Commission stated:

“ . . . where no technical change is proposed by Station KLNC(FM) and where no new short-spacing would be created and no existing short-spacing is exacerbated, we believe that Station KLNC(FM) should be afforded the same opportunity to reallocate its channel and change its community of license as the pre-1964 and the pre-1989 short-spaced stations.” Killeen and Cedar Park, Texas, *supra*, at Par. 11.

The Commission went on to say that “To do otherwise would result in preventing a station from changing its community of license where it did not create the short-spacing, even though the change results in a preferential arrangement of allotments.” *Id.* As discussed below, the policy established in Killeen and Cedar Park, Texas is sound, equitable, and serves the public interest and, therefore, should be continued.

The Commission's Reasoning is Sound. Just as it is reasonable to allow a pre-1964 or pre-1989 “grandfathered” short-spaced station to change its community of license pursuant to Section 1.420(i) (as long as the station proposes no change in site), so also is it reasonable to allow a station with short-spacings created to it pursuant to Section 73.215 to likewise change its community of license. In all such circumstances, the goal of a Section 1.420(i) community change – a preferential arrangement of allotments without a net loss in service – can be met whether a station is short-spaced or fully-spaced. The decision to extend Section 1.420(i) to stations short-spaced pursuant to Section 73.215 was a sound and reasonable one.

The Application of Section 420(i) is Equitable. There is no rational basis for distinguishing between grandfathered short-spaced stations and stations with short-spacings created to them under Section 73.215 of the Rules. In both cases, the station has become short-spaced through no action on its part, but as a result of Commission-initiated Rule changes or actions by other stations applying, with Commission approval, the Commission's spacing Rules. Thus, fundamental fairness requires that all like-situated short-spaced stations be permitted to take advantage of Section 420(i) to improve their service to the public.

The Policy Serves the Public Interest. Extension of Section 1.420(i) to stations short-spaced pursuant to Section 73.215 serves the public interest because it allows more stations to provide first aural transmission, first aural reception, and/or first local transmission service to communities lacking such services. Provision of these services, and the resulting "preferential arrangement of allotments," is the goal of the Section 307(b) of the Communications Act of 1934, as amended, and the Commission has specifically stated that Section 1.420(i) of its Rules was adopted to further the goals of Section 307(b). *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990). In the instant case, the petitioner has proposed to relocate Station KXTJ(FM) to provide a first local service at Dayton in furtherance of allotment Priority 3 (first local transmission service) without depriving Beaumont of its sole local service. By advancing allotment Priority 3 without adversely affecting existing transmission services, the public interest will be served by allowing short-spaced stations such as KXTJ(FM) to change communities under Section 1.420(i) in cases such as this, which serve to further the Commission's FM allotment goals.

CONCLUSION

WHEREFORE, KXTJ respectfully requests that the Commission AMEND the FM Table of Allotments, as proposed in the NPRM, to REALLOT Channel 300C, currently allotted to Beaumont, Texas, to Dayton, Texas, as its first local aural service. KXTJ further requests that the Commission AMEND the license of Station KXTJ(FM) to SPECIFY operation on Channel 300C at Dayton, Texas. KXTJ submits that it will apply for the channel if reallocated as requested herein.

Respectfully submitted,

KXTJ LICENSE, INC.

By: Mary L. Plantamura
Lawrence Roberts
Mary L. Plantamura

Davis Wright Tremaine LLP
1500 K Street, N.W.
Suite 450
Washington, D.C. 20005
(202) 508-6600


Its Counsel

March 6, 2000

CERTIFICATE OF SERVICE

I, Gwen Evans, an executive assistant in the law offices of Davis Wright Tremaine LLP, do hereby certify that a true copy of the foregoing "COMMENTS OF KXTJ LICENSE, INC." was hand delivered, this 6th day of March, 2000, to the following:

John A. Karousos, Chief,
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
Room 3-A266
445 12th Street, S.W.
Washington, DC 20554


Gwen Evans